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AUTHOR Trapp, Mary E.
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ABSTRACT

Examining interpretive approaches to the First Amendment free speech and press clause, this paper focuses on the conceptual framework proposed by John Hart Ely. Other First Amendment tests examined include clear and present danger, balancing, the absolute test, and A. Meiklejohn's "absolute" test. Following an analysis of Ely's First Amendment interpretation, the limitations of his tests are discussed. The "Branzburg," "Tornillo," and "Red Lion" cases are examined to demonstrate the weaknesses of those tests. The concluding section of the paper points out four problems of Ely's tests, indicating that the tests do not successfully implement the purposes of the First Amendment. (RL)

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THE IMPLICATIONS OF JOHN HART ELY'S CONCEPTUAL FRAMEWORK FOR INTERPRETATION OF FIRST AMENDMENT QUESTIONS: The Continuation of Balancing in the Free Expression Arena

Mary E. Trapp

Department of Mass Communication

California State University, Hayward

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Introduction

When a First Amendment theory emerges which promises to solve the shortcomings of its predecessors, researchers must take notice. In a recent book, John Hart Ely offers such a promise.[1] Whether he fulfills it is the subject of this paper.

Lack of a consistent, coherent theory for interpreting the free speech and press clause of the First Amendment to the United States Constitution poses problems for the researcher. These problems include: (1) Inability to articulate specific purposes of the amendment, and, thus, inability to articulate appropriate methods for its protection; (2) Difficulty in applying the amendment to specific fact situations; (3) Methodological difficulty in interpreting Supreme Court decisions in the free expression area, and, consequently, in predicting the course of future decisions;[2] (4) Difficulty in observing the impact of specific Supreme Court decisions on the system of free expression[3] operating in American society, and, thus, in determining the success or failure of a specific decision, i.e., the degree to which a decision encourages achievement of the purposes of the free speech and press clause.

This paper will examine interpretive approaches to the First Amendment free speech and press clause, with emphasis on the conceptual framework suggested by Ely. It will then apply the Ely framework to interpretation of Supreme Court decisions and will draw conclusions about the usefulness of the Ely approach.

After September 4, 1981, inquiries about this paper should be directed to the author at the following address: Department of Communication, Boise State University, 1910 University Drive, Boise, Idaho 83725.

Problems of Interpretation

Since the Supreme Court is the final arbiter of the meaning of the First Amendment, constitutional decisions in this area provide a fruitful source of information for researchers interested in understanding the role of free expression in American society generally, and the role of free expression as it involves the mass communication system specifically.

Any method for using Supreme Court decisions as a research resource falls back on analysis of language -- the specific language of the amendment, and the language used by the Court and other commentators in interpreting the amendment. To understand that this is a sometimes confusing task, one need only look to the words of the amendment itself. The pertinent sections read: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

While the language seems straightforward enough, a review of some of the interpretive problems that have arisen reminds one that the meaning of the amendment is not apparent on its face.

a. "Congress. . . .": In 1925, in Gitlow v. People of State of New York (268 U.S. 652), the Supreme Court decided that the First Amendment bound not only Congress, but also the state governments. The Court reasoned that the guarantees of free speech and press "are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states." Thus, the First Amendment was made applicable to the states through the Fourteenth, despite the limitation of the amendment's language to Congress alone.

b. ". . . shall make no law. . . .": Does the prohibition against abridgment apply only to laws? Does it also apply to administrative regulations having the effect of laws? Does it apply to governmental action taken absent the presence of laws or regulations?

c. ". . . shall make no law abridging. . . .": Can federal and state governments make laws promoting freedom of speech and press? The essentially laissez faire position of the government suggested by the amendment does not account for positive fostering of freedom of speech and press through such devices as postal rate benefits. Nor does it account for government intervention in mass communication aimed at guaranteeing a version of free expression which can be interpreted as an infringement of the First Amendment rights of professional communicators, e.g., the Federal Communications Commission's fairness doctrine, upheld in Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969).

d. ". . . abridging. . . .": What constitutes an abridgment? If an abridgment is any frustration of freedom of speech and press, then libel laws, obscenity laws, postal rate increases, FCC regulations and copyright laws all seem problematic.

e. ". . . freedom of speech. . . .": Does the amendment protect freedom of speech, or speech itself? What exactly is the difference between the two? This distinction was important to Alexander Meiklejohn, an important contributor to First Amendment commentary.[4]

Further, what is speech? Beyond the common sense definition lie the areas of "Speech-plus," and the tautological "symbolic

speech," used to subsume under the First Amendment activities such as burning a draft card or wearing a black armband.[5]

f. ". . . or of the press. . . .": Should the press be defined as professional communicators only, or do all citizens have an equal guarantee of freedom of the press? Further, how do radio, television, and other new technologies fit within the concept of the press, which traditionally has meant the print media?

In addition to problems of interpreting the language of the amendment itself, one must consider the amendment in the context of the Constitution, which raises the problem of competing constitutional guarantees. How does the language of the First Amendment fit with the sometimes conflicting language in other parts of the Constitution, e.g., the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

Yet another interpretive pitfall is the extra-constitutional extrapolation of meaning, in an attempt to find a constitutional basis for deciding questions about activities which the amendment does not mention, but which seem to be implied by its words, for completeness of thought. For instance, if I have a right to speak, do I have a complementary right <u>not</u> to speak?[6] If I have a right of freedom of the press, does that imply a right of access to the media which constitute "the press" in America today?[7]

In facing these semantic quandaries, we face the question of determining appropriate rules for analysis of constitutional language. That rules can be fashioned is suggested by Ely's recommendations: (1) That the themes of the rest of the Consti-

tution itself should be the fundamental reference when we are attempting to divine the meaning that should be infused into open-ended constitutional guarantees,[8] and (2) that interpretations should try not to say less than the language allows.[9]

The debate over First Amendment interpretation, however, suggests that few are willing to interpret First Amendment language to the hilt, primarily because we don't seem to trust unfettered free expression. We seem to fear expression the most when we think it will be effective.[10] One version of this argument against a generous interpretation of the amendment predicts that, by allowing unlimited freedom, we will cause legislative majorities to be outraged by dangerous challenges to the American political system. As a result, the legislature will impose greater restrictions on free expression than would have occurred had the amendment been narrowly interpreted in the first place.[11] This view encourages the conclusion that interpretation of First Amendment guarantees is dependent on the political climate, and on the values and fortitude of the judges applying it to particular cases.[12] That conclusion does not solve the problem of fashioning some reasonable rules for interpreting what the First Amendment means.

Procedures for Applying the First Amendment to Cases

The discussion above should serve to remind us of the central importance of Supreme Court interpretation of the meaning of the First Amendment. Coming to some conclusion about what the amendment means assumes two things: (1) Some view of what the amend-

ment is for; (2) Some idea of how this purpose can be implemented by specific procedures fitting the particular demands of the case under consideration.

The purposes of the amendment are more or less agreed upon, though explanations are often phrased in overly broad generalities.

Those who define the amendment's purpose by examining the intent of the framers usually conclude that the amendment was intended only to leave to the states the power to control speech and press, or that the amendment was intended simply to transplant to America the English tradition against prior restraint, leaving intact the English law of seditious libel, or that the framers didn't really know what they meant by the amendment.[13]

Those who define the purpose of the amendment by analyzing it in the context of American attempts at a democratic political system usually invoke some version of the free marketplace of ideas concept,[14] citing John Milton, John Stuart Mill, and Thomas Jefferson to explain the necessity of free expression in a political system in which the people are supposed to control those who govern. In order to exercise this control, the people must educate themselves about what is going on, and must form opinions about events. To do this, they must be able to get and give information and opinions freely. This is why the First Amendment protects freedom of speech and press.

A contemporary interpretation revises this idea slightly. In this view, mass communication technology has grown so expensive and complicated, and media organizations have grown to be so huge and inaccessible, that the press, as the "Fourth Estate" of government, must exercise the First Amendment freedoms on behalf of the

people, who can no longer realistically exercise those freedoms themselves. Because the media are standing in for the public in this way, they may deserve exceptional rights under the First Amendment, exceeding those held by a mere citizen.[15]

Ideas about how these purposes can be implemented are distilled into what are usually referred to as "tests" of the First Amendment. Methodologically, some logical relationship should be shown to exist between a statement of what the amendment is for and a statement of how to implement it. This relationship between the often inspiring words about democracy and the often messy problems which constitute First Amendment cases ideally would be articulated to show how the former determines the procedures for solving the latter. In practice, however, the relationship is usually not satisfactorily articulated.[16]

While the variety of tests and doctrines employed in First Amendment interpretation is large,[17] the tests that are most widely known are probably the clear and present danger test, the balancing test, and the absolute test. Meiklejohn's two-tiered "absolute" interpretation is another influential test.

The clear and present danger test was developed in the first significant free speech case to reach the Supreme Court, Schenck v. United States, 249 U.S. 47 (1919).[18] Oliver Wendell Holmes, writing for the Court, said:

> The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Felix Frankfurter's concurring opinion in Dennis v. United States, 341 U.S. 494 (1951), presents a concise statement of the

balancing test, which is "the candid and informed weighing of the competing interests, . . ."[19]

The "absolute" test is most closely identified with Hugo Black. In his concurring opinion in Smith v. California, 361 U.S. 147 (1959), Black explained the test:

> That Amendment provides, in simple words, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." I read "no law . . . abridging" to mean no law abridging.

A different form of the absolute test was advanced by Meiklejohn. He advocated absolute protection of public speech (that speech concerned with the self-governing process), but he would have allowed regulation of private speech. His view was that the First Amendment ". . . is indifferent to the rights of private speech."[20]

The fundamental problem with applying any of these testing procedures to individual cases involving free expression interests is that they are vaguely stated guidelines which bear no necessary relationship to the equally vaguely stated purposes of the amendment. With the illusion of precision they provide comes the practice of judicial discretion. The language of the amendment then is not interpreted logically or generously. The tests <u>all</u> reduce to ad hoc balancing.

The clear and present danger test is a case in point. Through 30 years of judicial interpretation it evolved from a test which allowed the government to send a man to jail for advocating draft resistance, Schenck v. U.S., 249 U.S. 47 (1919), to a test which allowed the government to convict communists for trying to organize groups to read and teach Marxist-Leninist doctrine, Dennis

v. U.S., 341 U.S. 494 (1951). The dangers in these cases seem neither clear nor present.

The test received its most precise and narrow statements in the dissenting opinion of its author, Holmes, in Abrams v. United States, 250 U.S. 616 (1919),[21] and in the concurring opinion of Louis Brandeis in Whitney v. California, 274 U.S. 357 (1927).[22]

The test's primary role in Court decisions seems to have been to legitimate the idea that, as Meiklejohn expressed it, "Congress . . . is forbidden to destroy our freedom except when it finds it advisable to do so."[23] This certainly reduces to a balancing of interests, especially during times of political paranoia.

The balancing test shares the same drawback, but at least it purports to do nothing more.

The absolute test fails because it says more than even Black or William Douglas in practice believed. The test says no expression may be abridged under any circumstances, when in practice some expression must be regulated to a degree deserving the term "abridgment." Regulation of the time, manner, and circumstances of expression is an example. As Ely suggests, tongue in cheek, he certainly has a right to disseminate the message, "Ely for Congress," but he doesn't have a constitutional right to shout the message through a bullhorn at your bedroom window at three in the morning, or "to firebomb the Post Office to dramatize the postal service plank" of his platform.[24] By not acknowledging the realistic need for some limitation on expression, the absolute test encourages disbelief of judicial statements. It also encourages judges, outside of public scrutiny, to engage in ad hoc balancing while not admitting it.

An additional problem is logical inconsistency. The absolute interpretation focuses on "no law abridging," but glosses over "Congress." Proponents of the absolute test are willing to be absolute about the phrase, "no law abridging," with a less than absolute interpretation of the term "Congress," preferring to abide by the not-so-literal extension from Congress to the states of the First Amendment, via the Fourteenth Amendment.[25]

Meiklejohn's two-tiered theory invites debate about how to draw the line between public and private speech. Making that determination would involve some degree of balancing, at least in difficult cases.[26]

This reduction of existing "tests" to ad hoc balancing protects less than the language of the amendment demands: Congress shall make no law abridging freedom of speech or press.

A second problem is that these tests provide no clear guidance about standards to be used in doing this balancing. Convincing arguments can be made that judges have no solid basis, except personal values, for making balancing decisions. Since Supreme Court judges are appointed rather than elected, the act of imposing personal values in constitutional adjudication can be criticized as inserting an inherently undemocratic element into the American political system.[27]

A third problem is that, for the researcher, these tests provide no logical means for connecting, through analysis of cases, the judicial decision with either the purposes of the amendment or the successfulness of the decision in achieving the purposes of the amendment. Attempts to make such connections can be faulty

wherever they fall on the ad hoc analysis continuum. One extreme finds the researcher simply judging cases on the basis of his or her own personal values. The other extreme finds the researcher seeking some sort of analytical clarity by defining a "core" area of protection -- usually political expression -- so narrowly that a constitutional guarantee becomes almost meaningless. This does have the advantage of allowing the researcher to draw some supportable conclusions about whether cases are decided correctly. However, the cost of such precision is very high.

The problem of overly narrow definition is lurking in Meiklejohn's test, as well as in Thomas Emerson's expression-action distinction.[28] It is drawn to what may be its logical conclusion in a paper that won second place in the 1980 Association for Education in Journalism Law Division's First Amendment theory competition.[29] In that paper, core protection of communication was reserved for "political communication relevant to ballot issues," on the theory that the citizen's central responsibility in a democracy is to vote.[30]

Ely's Alternative to Existing Procedures for Interpreting the First Amendment

Ely argues that the central problems of a functioning democracy are ensuring rule by the majority living at the time, while protecting the interests of minorities. He thinks the framers of the Constitution understood this and, thus, wrote a document concerned primarily with procedural guarantees rather than with guarantees of substantive values, which the founders apparently

knew would change over time. Therefore, many constitutional guarantees, e.g., the prohibition against cruel and unusual punishment, are open-ended and require an infusion of content from somewhere beyond the language of the guarantee itself.

With emphasis on procedure, the Constitution aims at protecting minorities. With open-ended procedural guarantees, whose substantive content must be filled in, the Constitution allows the dominant values to be those of the living majority. The result, Ely contends, is a democratic document.

The question this raises is how we should arrive at the values to be filled in. A review of First Amendment balancing tests suggested that, absent a clear, logical guide, the source is likely to be the personal values of judges, which is not a democratic source.

Ely argues for what he describes as "interpretivism," that is, determining the values by interpreting the Constitution itself.[31] This seems at first glance paradoxical, because he has argued that, for the most part, substantive values are not included in the Constitution. When he argues for finding the values in the Constitution, however, he is referring to what he sees as the most basic values which inform the Constitution, and these turn out to be procedural values: (1) Equal representation in the process of self-government; (2) Equal opportunity to share in the benefits of the democratic political process. Both values emphasize participation in the political process.[32] When judges are faced with open-ended constitutional guarantees, they should decide the case in a way which achieves realization of the procedural values described above. Ely calls this a "participation-

oriented, representation-reinforcing approach to judicial review."[33]

Ely thinks that the Warren Court, toward the end of its era, was starting to develop this approach to judicial review, in, e.g., its Gideon, Miranda, and reapportionment rulings.[34] The Burger Court, he contends, is backsliding -- muddying its decisions through imposition of personal values of the justices.[35]

The First Amendment plays a dual role in this scheme of judicial review. Specifically, the amendment is included in the Constitution for the ". . . central function of assuring an open political dialogue and process, . . ."[36] As part of the Constitution in general, the First Amendment can be seen as a procedural guarantee which, along with other provisions, aims to assure equality of participation in the political process and equality of access to the fruits of the political process.[37]

In attempting to implement the purpose of the First Amendment, Ely does not follow the path of Meiklejohn et al. by arguing that political expression deserves greater protection than other kinds of expression. Because of his concern for the existing language of the amendment,[38] and his antipathy to judging expression on the basis of the personal substantive values of those doing the judging, Ely fashions from existing decisions two procedural tests for First Amendment cases.

In cases where the perceived harm arises from something other than the message itself, the Court should proceed on a "specific threat" approach, which requires judges to attend to the context of the case and to assess the particular threat posed by the communication in question,[39] e.g., the sound truck cases.[40]

This does not differ radically from a balancing test. Ely says it includes clear and present danger as well as ad hoc balancing.[41]

Where the perceived harm comes from the message itself -- from fear of the content itself -- the Court should adopt an "unprotected messages" approach, which would:

> . . . minimize assessment of the dangerousness of the various messages people want to communicate. That means, where state officials seek to silence a message because they think it's dangerous, that we insist that the message fall within some clearly and narrowly bounded category of expression we have designated in advance as unentitled to protection. 42

Ely acknowledges that this won't guarantee liberty, but he argues that it is the surest available way to guard against "judicial capitulation" to changing popular passions.[43]

An example of an unprotected messages category might be "instructions on building nuclear weapons." If a message does not fit into a predetermined category, it is simply protected.

Ely argues that the court has had no difficulty understanding the specific threat test. It has had a more difficult time understanding the unprotected messages approach, though Ely believes that the Warren Court was beginning to develop it.[44] With both tests, Ely urges narrow, precise construction of standards, so that the tests do not revert simply to balancing and reasonableness standards.[45]

As Ely notes,[46] however, the balancing procedure[47] cannot be eradicated from the specific threat approach. This may be crucial in assessing the value of his tests, since some of the most critical free expression issues reaching the Supreme Court seem comprehensible within his framework only if viewed from a specific threat perspective, as will be discussed below. If this

is an accurate interpretation of the Ely tests of the amendment, it is difficult to see how his approach differs radically from existing practice, which is that balancing is the dominant method used to decide free expression cases.

Application of Ely Tests

The two Ely tests aid conceptual clarity by the simple observation that two kinds of cases -- requiring two kinds of tests -- reach the Supreme Court. By demanding a stricter test for cases where the message is thought to be dangerous, Ely's tests probably encourage greater protection of messages in and of themselves. Attempted application of the tests may suggest areas of weakness, however.

The unprotected messages test seems applicable in such broad areas of law as libel, obscenity, and privacy cases. These areas are all essentially concerned with the danger of the message itself.

Indeed, an unprotected messages approach in libel seems relatively close to the traditional category of libel per se, in which such claims as charging a person with commission of a crime, questioning a woman's chastity, or imputing that a person has a loathsome disease, are libelous on their face.

In obscenity, it is arguable whether the unprotected messages test is far from the original Roth standard, which was that obscenity is not protected by the First Amendment and that obscenity is "material which deals with sex in a manner appealing to prurient interests."[48] The definitional problems raised by the term "prurient" do not change the fact that in this case the

Court specified a category of messages that simply are not protected.

In privacy, the unprotected messages test seems compatible with Dean William Prosser's characterization of the tort as four specific injuries.[49]

Despite the apparent applicability and clarity of the unprotected messages test, it leaves some troubling questions unanswered.

First, for the researcher, it poses the problem of predicting the nature of the categories a court might devise.

Second, Ely specifies that the unprotected categories would have to be determined in advance of the decision applying the test to a message.[50] Apparently, this would have to be done by judicial precedent, since it does not seem feasible, given the First Amendment, for Congress deliberately to devise a list of messages it legally can abridge. If the Supreme Court creates the list in advance of cases coming before it, it would nevertheless have to do so in a decision. This raises the question of the legal force of dicta, since it is probable that fashioning such a list would move beyond solution of the legal question the Court might use as a vehicle.

However the list might be devised, its existence would seem to contradict Ely's concern for constitutional interpretation which does not protect less than the language of the text allows. On the one hand, we would have the amendment with its phrase, "no law abridging." On the other hand, we would have a judicially sanctioned list of messages -- however narrowly drawn -- which legally may be abridged.

This raises a third, related question. What is the rationale for not protecting all messages? Ely only tells us that "[n]o responsible approach to the problem can be oblivious to the dangers certain types of expression pose: . . ."[51] It is his contention that the unprotected messages test is distinguished from specific threat tests by the advance decision of what expression is unprotected.[52] How the unprotected messages test differs from a clear and present danger test, beyond the advance determination, is not clear. How the test is different from the specific threat test is not clear, either. We are left with the conclusion that the messages left unprotected are so characterized because the harm of publishing them outweighs the harm of suppressing. This is still balancing, even if it is done before publication of the message, rather than after.[53]

Nothing in the unprotected messages test itself necessarily provides for more protection than is provided by existing tests. All that remains is Ely's reassurance that the test is "the surest hedge against judicial capitulation that humans have available."[54]

Ely's specific threat test is a balancing test that applies when the perceived harm results from something other than the message itself, and he acknowledges that the approach has been well understood by the Supreme Court.[55] This test seems to be little more than business as usual in interpreting the free speech and press clause of the First Amendment.

Of Ely's two tests, the specific threat test, with its balancing, is the only one that can sensibly be applied to critical kinds of cases[56] determining who can participate in what ways in mass communication. This is an important point, because Ely argues

that the prime function of the Constitution is to guarantee participation of two kinds: participation in the political process, and participation in enjoyment of the fruits of the political process. This participational concern should logically apply specifically to interpretation of the First Amendment. An "open political dialogue and process" should require participation in the public communication system in both ways outlined above: in the process itself, and in the fruits of the process. The public communication system is increasingly dominated by mass communication, and nothing in Ely's tests can implement within the mass communication system that requirement of public participation in the process itself.

Ely's First Amendment tests are applicable case-by-case to discrete messages. Participation here is bounded by these questions: Does the individual or medium in question have the right to disseminate this message (unprotected messages test)? Does the individual or medium in question have the right to disseminate this message under these circumstances (specific threat test)?

A more realistic assessment of participation in public communication must consider, not just the message, but also the process by which messages are produced and disseminated. Such an assessment should consider the consequences of the interposition between individuals and the government of a large and powerful mass communication industry, an industry which for the most part is not accessible to private individuals and which assumes quasi-governmental functions captured by the term, "The Fourth Estate."

The growth of this industry presents questions the Ely tests cannot handle. The participational questions the Ely tests leave unanswered are fundamental: (1) Do the mass communication media

have greater rights of free expression than do members of the general public? (2) Within the mass communication industry, do some media (print) have greater rights of free expression than do other media (broadcast)?

To cases in which these questions are raised, the Ely tests bring no methods for deciding the case which are much different from what is already in use. Further, the Ely tests do not provide any insight or guidelines for deciding the cases in some way that increases the quality of public participation in the ongoing political dialogue.

Closer examination of cases in which these questions are raised may demonstrate the inability of the Ely tests to link the court decision to participational goals.

Whether the First Amendment provides greater protection to mass communicators than to the general public will be the first question considered. It is an issue central to the question of participation, and one on which disagreement is common.

The American Society of Newspaper Editors says, in its Statement of Principles, that the First Amendment "guarantees to the people <u>through</u> <u>their</u> <u>press</u> a constitutional right. . . ." [Emphasis added.] This point of view finds support in Justice Potter Stewart's reasoning that "[t]he publishing business is, in short, the only organized private business that is given explicit constitutional protection."[57]

This is in contrast to the position espoused by Justice Lewis Powell, that ". . . the press does not have a monopoly on either the First Amendment or the ability to enlighten."[58]

That mass communicators should have some First Amendment

right greater than that available to the general public is assumed by proponents of a privilege for journalists. The controlling Supreme Court decision in this area is Branzburg v. Hayes, 408 U.S. 665 (1972). The Court, in a 5-4 decision, did not find in the First Amendment an absolute or qualified newsman's privilege against revealing confidential sources. State statutory activity and lower court action since Branzburg have created varying degrees of protection for journalists,[59] but the Supreme Court in two separate instances this term refused to hear cases involving the privilege question. In January 1981, the Court declined to hear Schaffer v. United States, 49 U.S.L.W. 3515. In that case, a Philadelphia reporter was ordered jailed because she refused to disclose confidential sources. The Court also refused to hear Cuthbertson v. CBS, 49 U.S.L.W. 3531. In that case, the U.S. Court of Appeals upheld a lower court decision that CBS could be forced to produce outtakes centrally relevant to a criminal fraud defense. In holding that, however, the Court of Appeals noted that "journalists have a federal common law qualified privilege to refuse to divulge confidential sources."[60]

The inability of either of the Ely tests to suggest solution of the question whether mass communicators have greater First Amendment rights than the general public may be suggested by examination of a specific fact situation. One of the three cases[61] decided in Branzburg v. Hayes will suffice.

In two separate decisions, the Kentucky Court of Appeals denied the petitions of Branzburg for mandamus and prohibition of a grand jury request for identity of individuals Branzburg had actually witnessed possessing marijuana, making hashish from

marijuana, or engaging in any other criminal acts involving drugs.

The unprotected messages test does not apply to this situation because the primary question behind privilege cases is not the right to disseminate messages at all. It is the right to publish the message while keeping secret the identity of the source of the information. The Supreme Court was clear on this issue:

> . . . this case involves no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here.

If an Ely test is to apply, it must be the specific threat test, which leaves us with the question: What is the perceived harm? The harm here is the reporting of criminal activity observed by the reporter, coupled with his refusal to testify before a grand jury about the identity of the individuals involved in criminal behavior, a generally applicable obligation of any citizen. Determination of the applicability of the specific threat test leaves us with the balancing inherent in that approach. Does the judicial system's need for the information outweigh the mass communication industry's need to keep it confidential? However the question is answered, the balancing process does not necessarily introduce the crucial participational question: Should the press have any greater need for, or right of, maintaining confidentiality in judicial proceedings than do members of the general public? This question obviously might be addressed in a privilege decision, but nothing in the specific threat test necessarily requires it. The privilege question is significant because it could lead to the government's need to determine who

is and who is not a journalist for the purposes of claiming the privilege. Thus, a grant of privilege could lead eventually to establishment of licensing of journalists, which would firmly legitimate a hierarchical interpretation of First Amendment rights.

Another participational issue is raised by the access question, as represented by Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). In that case, Pat Tornillo was a candidate for the Florida Legislature, and the Miami Herald opposed his election in two editorials. Under Florida's right of reply statute, Tornillo requested that the Herald print verbatim his response to the editorials. The Herald refused. The state Supreme Court upheld the constitutionality of the right of reply statute, but the U.S. Supreme Court overturned the decision and decided for the Herald.

Again, what Ely test would apply here? The unprotected messages approach does not seem to apply, since the message itself -- Tornillo's reply to Herald editorials calling him a lawbreaker -- was not forbidden. The legal question arose in circumstances of dissemination of the message, so the specific threat test once again must apply, if either Ely test can be used. The harm the Supreme Court perceived was not in the message, but in the government stipulating what a newspaper must publish. The issue to be balanced is the value of editorial autonomy versus the harm of such governmental stipulation of editorial content. This question can be discussed in terms of the press versus government very nicely. The participational question, of the right of the individual to a forum versus the right of a communication medium to editorial autonomy, need never be raised. Nor need be raised

the participational question whether dissemination of a message through other channels (such as writing out the message and nailing it to a tree[62]) has the impact equivalent to printing the message on the front page of the New York Times, or on the editorial page of the Miami Herald. These are questions which neither Ely test forces the Court to address.[63]

Directly counter to the Tornillo reasoning is the Supreme Court's willingness to enforce programming restrictions and requirements on broadcasters because the airwaves are defined as a public resource. A case which illustrates this, and which highlights the question whether print media have more rights than broadcast media, is Red Lion Broadcasting Co. v. the Federal Communications Commission, 395 U.S. 367 (1969). In that case the Court upheld the constitutionality of the FCC's fairness doctrine and specified that "[i]t is the right of viewers and listeners, not the right of the broadcasters, which is paramount."

In this case again, the question is not one of the government attempting to punish or prohibit some message, so Ely's unprotected messages approach does not apply. If an Ely test is to be used at all, then, the specific threat test has to be used. The harm perceived here by the Court was that licensees might not, without governmental intervention, provide the public with "suitable <u>access to</u> social, political, esthetic, moral, and other <u>ideas and experiences</u>. . . ." [Emphasis added.] Further applicability of the specific threat test is suggested by the Court's citation of Kovacs v. Cooper, 336 U.S. 77 (1949) -- a sound truck case -- to justify government regulation of broadcasting.

In upholding government intervention in broadcasting, the

Court came down on the opposite side of the Tornillo case question, whether government should dictate content. The nature of the medium was the decisive factor. In this case, broadcasters' rights to speak are subordinate to the audience's rights to view and hear, and broadcasters have narrower rights of free expression than do print media under this decision.

The Court could have defined the specific threat as impairment of broadcasters' rights, and could have reached a decision similar to the Tornillo decision, but it didn't, and nothing in the specific threat test would require that sort of comparable definition of specific threats. This suggests that the specific threat test can be verbally manipulated as easily as any other First Amendment test, and that something prior to the application of a First Amendment test is probably controlling the decision here.

The bare outlines of a hierarchical scheme of rights seem to be developing in recent Supreme Court First Amendment case law.[64] Print journalists seem to have most rights, definitely more than broadcasters. Broadcasters and print communicators have more rights than the average citizen. This, if correct, seems inconsistent with a goal of increased participation in the public communication system, and Ely's tests do not create mechanisms for changing the direction of the Court and effecting such participation. Neither test addresses questions of the individual versus the mass communication industry, which is perhaps the crucial question of participation in an "open political dialogue" in the 1980s. Neither test addresses participation at any level at all.

Conclusions

Further analysis of decisions is needed to arrive at an unequivocal judgment about the worth of Ely's tests as analytical tools for the researcher.

On the positive side, Ely offers a promising statement of the purposes of the First Amendment in its constitutional context. Furthermore, he clarifies the discussion of free expression issues by delineating two kinds of free expression cases, which require different kinds of solutions.

On the negative side, four problems remain. First it is unclear whether the researcher can meaningfully apply the unprotected messages test in interpreting decisions absent any clear indication of the nature of the categories a court might devise.

Second, it is questionable whether the expansive character of the specific threat test makes it any different from conventional balancing.

Third, it is unclear whether the variety of fact situations subsumed under the free expression umbrella all lend themselves to analysis using the two Ely tests.

Fourth, it is not clear that the two tests effect the critical connection between the purposes of the amendment and the legal decisions implementing it. The analysis above suggests that the tests do not effectively implement the goal of public participation in an open political dialogue and process, or public participation in the fruits of that dialogue and process.

Given the doctrinal disarray of existing free expression theories and tests, Ely's explication may be the most rigorous available.[65] Ely himself, in discussing the absolute test, suggests

the next, hard step. He writes, "The trick, of course, is to find something better."[66]

Footnotes

1. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (Cambridge: Harvard University Press, 1980).

2. This creates discomfiting situations for the researcher, whose incorrect predictions may be preserved in print for others to remark over. For the communication industry, however, it creates a more serious problem of planning for the future without guidelines about what will be legally acceptable. Impact on expenses (e.g., legal fees, settlements) is no small concern, especially for small print and broadcast operations, but a larger problem may be a "chilling effect" on experimentation or on reporting of sensitive or unpopular topics.

3. This term is borrowed from Thomas I. Emerson, The System of Freedom of Expression (New York: Random House, 1970).

4. Alexander Meiklejohn, Political Freedom (New York: Harper & Brothers, Publishers, 1948, 1960), p. 21.

5. United States v. O'Brien, 391 U.S. 367 (1968), draft card burning; Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969), arm bands.

6. Wooley v. Maynard, 430 U.S. 705 (1977). The right to speak includes the right to refrain from speaking.

7. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

8. Ely, pp. 16, 12, 28, 101.

9. Ibid., p. 94.

10. Ibid., p. 109.

11. Donald M. Gillmor and Jerome A. Barron, Mass Communication Law: Cases and Comment, 3rd ed. (St. Paul: West Publishing Co., 1979), pp. 17-18.

    A closely related argument against the trivialization of the First Amendment by overly broad interpretations of it is made by Charles Rembar in his article, "For Sale: Freedom of Speech," The Atlantic Monthly, March 1981, pp. 25-32.

12. Ely, p. 112.

13. See, generally, Leonard W. Levy, Freedom of Speech and Press in Early American History: Legacy of Suppression (New York: Harper & Row, 1960), esp. pp. 10, 236-237.

14. Fred S. Siebert, Theodore Peterson and Wilbur Schramm, Four Theories of the Press (Urbana: University of Illinois Press, 1963), pp. 44-47.

See also the dissenting opinion of Oliver Wendell Holmes in Abrams v. United States, 250 U.S. 616 (1919).

15. See, for instance, the comparison between Alexander Meiklejohn's view and Vincent Blasi's view of the amendment in Gillmor and Barron, pp. 16-17.

See also Blasi, "The Checking Value in First Amendment Theory," 1977 American Bar Foundation Research Journal 521.

16. "All the tests are excessively vague, little more than exercises in semantics. Efforts of the courts to deal with the more complex theoretical problems, such as 'symbolic speech,' have only made the situation worse. All in all doctrinal support for the system of freedom of expression is in a sad state of disarray." Emerson, p. 16.

17. Ibid., pp. 15-16.

18. Alexis J. Anderson argues that significant contributions to First Amendment theory were made much earlier than the Schenck decision, although mostly at the state and municipal level rather than at the federal court level. "The Formative Period of First Amendment Theory, 1870-1915," 24 American Journal of Legal History 56 (1980).

19. For a detailed examination of the balancing test, see David S. Bogen, "Balancing Freedom of Speech," 38 Maryland Law Review 387 (1979).

20. Meiklejohn, p. 83. See also p. xv and, generally, pp. 79-84.

21. ". . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country," Holmes wrote in his Abrams dissent.

22. Brandeis said, "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

It should be noted, in light of the apparent narrowness of Brandeis's formulation of the clear and present danger test, and in light of the passion with which he speaks, that Anita Whitney was nevertheless convicted under the California

Criminal Syndicalism Act simply for participating in a convention which formed the Communist Labor Party of California. The Supreme Court affirmed her conviction, and Brandeis and Holmes concurred in the result.

23. Meiklejohn, p. 30.

24. Ely, p. 110.

25. Gitlow v. People of State of New York, 268 U.S. 652 (1925).

26. In the words of Zechariah Chafee, Jr., "The most serious weakness in Mr. Meiklejohn's argument is that it rests on his supposed boundary between public speech and private speech. That line is extremely blurred." "Book Review of Meiklejohn's 'Free Speech,'" 62 Harvard Law Review 891.

27. See, generally, Ely, pp. 43-72.

28. Emerson, pp. 17-19.

29. John L. Hodge, "Democracy and Free Speech: A Normative Theory of Society and Government," a paper presented at the annual convention of the Association for Education in Journalism, Boston, Mass., August 1980.

30. Ibid., p. 44.

31. Ely, pp. 12, 16, 28, 101.

32. Ibid., pp. 87, 99, 181.

33. Ibid., p. 87.

34. Gideon v. Wainwright, 372 U.S. 335 (1963); Miranda v. Arizona, 384 U.S. 436 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

35. Ely, pp. 239n61, 247-249n52.

"What outlook does underlie the Burger Court's constitutional jurisprudence? The safest answer, and in this case probably the most accurate, is what Winston Churchill is reported to have said of a pudding someone served him: it seems to lack a theme. One can, however, identify strong elements of a value-imposition methodology." Ibid., p. 248.

36. Ibid., p. 112. See also pp. 93-94.

37. Ibid., pp. 76-77, 100-101.

38. Ibid., p. 94.

39. Ibid., p. 111.

40. Saia v. New York, 334 U.S. 558 (1948); Kovacs v. Cooper, 336 U.S. 77 (1949).

41. Ely, p. 110.

42. Ibid., p. 112.

43. Ibid.

44. E.g., Brandenburg v. Ohio, 395 U.S. 444 (1969).

45. Ely p. 115.

46. Ibid., p. 231n14.

47. The term "procedure," or the alternative, "test," both give the balancing process an overly precise sound, as if there were actually some formula to be followed in balancing. There isn't.

However, see Bogen, "Balancing Free Speech," pp. 388-389, for the argument that the Supreme Court tends to use the balancing test under specifiable circumstances. Nevertheless, this does not make the actual process of weighing the competing interests any more precise.

48. Roth v. United States, Alberts v. State of California, 354 U.S. 476 (1957).

49. Prosser's description of the tort is:

"1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.

"2. Public disclosure of embarrassing private facts about the plaintiff.

"3. Publicity which places the plaintiff in a false light in the public eye.

"4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." Prosser, "Privacy," California Law Review, Vol. 48, August 1960, pp. 388-389.

With the exception of Prosser's first category, these descriptions seem comparable to categories of unprotected messages.

50. Ely, p. 112.

51. Ibid., p. 110.

52. Ibid.

53. In fact, Ely's stipulation that the unprotected status of the message be determined in advance can be interpreted as a recommendation for legally approved prior restraint, or at least for a list of punishable messages that would have a "chilling effect" approaching prior restraint. This seems to be a step backward, rather than forward, in protection of expression.

54. Ely, p. 112.

55. Ibid., p. 113.

56. Certain kinds of cases, which appear to the observer to have significant free expression implications, cannot be clarified by use of any First Amendment test, Ely's or other tests, if the Supreme Court decides them on other grounds. A case in point is Chandler, et al., v. Florida, 49 U.S.L.W. 4141 (1981).

The case was an appeal from the Supreme Court of Florida on the question ". . . whether, consistent with constitutional guarantees, a state may provide for radio, television, and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the accused." The case was a test of the Florida pilot program for televising judicial proceedings. The Supreme Court affirmed the decision of the Florida Supreme Court, with Justices Potter Stewart and Byron White concurring in the decision. Justice John Paul Stevens did not participate in the decision. Chief Justice Warren Burger wrote the majority opinion.

The case is interesting because, while it has been received by professional communicators as a First Amendment victory of sorts, the decision neither mentions the First Amendment nor frames the discussion in terms of First Amendment issues. The case was not decided on First Amendment grounds, but on Sixth and Fourteenth Amendment grounds. Appellants argued that televising of trials is inherently a denial of Fourteenth Amendment due process. The majority opinion speaks to this and to the "fundamental right of the accused to a fair trial."

Appellants argued that any televised coverage of their trial was inherently prejudicial. The Court failed to accept this because no showing of denial of due process was made by appellants, and because available data from experiments in other states did not support that argument. The method of presentation--broadcast--is at issue here, not public dissemination of the message itself, i.e., of the trial proceedings. Therefore, as in the sound truck cases, the argument seems to be that the message itself is <u>not</u> the perceived harm. If this is correct, Ely's specific threat test, examining the particular situation in context to determine whether the perceived harm can be demonstrated to outweigh the value of the message, would seem to be applicable, had the Court acknowledged a First Amendment issue.

The Court does cite the Florida Supreme Court's statement that televised coverage might serve the public need to know of and understand the American judicial process. However, the Court analyzes the Estes v. Texas ruling, 381 U.S. 532 (1965), to argue that, if evidence were produced that the broadcast was prejudicial, Estes would control and ". . . our task would be simple: pronibition of broadcast coverage of trials would be required." This use of Estes is disputed by White and

Stewart, who argue in concurring opinions that Chandler overrules Estes and that the Court ought to admit that.

The Court decision is a narrow one. Burger wrote: "Absent a showing of prejudice of constitutional dimensions to these defendants, there is no reason for this Court either to endorse or to invalidate Florida's experiment.

". . . We hold that the Constitution does not prohibit a state from experimenting with the program authorized by revised Canon 3A(7)."

The holding leaves mass communication practitioners with the assurance that broadcast coverage of trials is not prohibited this time, but that next time it could be. Predictability is absent.

Any reference to First Amendment issues, however couched, would have improved the approach the Court used. There isn't enough evidence to say whether the Ely test would be better than any other in achieving the purposes of the First Amendment in this case.

57. Stewart, "Or of the Press," 26 Hastings Law Journal 631, 633-634 (1975).

58. First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

59. Wayne Overbeck, "Reporter's Privilege in the 1980s: Statutory Limitations and Common Law Expansion," Fullerton, Calif., January 1981. (Ditto.)

60. News Media and the Law, Feb.-March 1981, p. 46.

61. The three cases are Branzburg v. Hayes (which comprises two judgments of the Kentucky Court of Appeals--Branzburg v. Hayes and Branzburg v. Meigs), In the Matter of Pappas, and United States v. Caldwell.

62. This possible means of dissemination is suggested in State v. Buchanan, 436 P.2d 729 (Or. 1968).

63. Ely, p. 111, does make the argument that, ". . . a more serious threat should be required when there is doubt that the speaker has other effective means of reaching the same audience."

64. For a discussion of this issue, see Jerome A. Barron, "The Rise and Fall of a Doctrine of Editorial Privilege: Reflections on Herbert v. Lando," 47 George Washington Law Review 1002 (1979). Barron suggests that the question of a hierarchical interpretation of First Amendment rights is considered by the Court in Herbert v. Lando, 441 U.S. 153 (1979). He argues that the Court opted in that case for a populist rather than a hierarchical interpretation of the

First Amendment, p. 1029. The question is not yet settled, however, because editorial autonomy cases, e.g., Miami Herald Co. v. Tornillo, 418 U.S. 241 (1974), and Columbia Broadcasting System, Inc., v. Democratic National Committee, 412 U.S. 94 (1973), have not yet been reconciled with cases in which editorial privilege is de-emphasized in favor of other First Amendment values, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In addition, lower court activity tending to recognize some degree of qualified editorial privilege makes this an issue likely to come before the Supreme Court in the future; the stance the Court is likely to take is still not certain, p. 1016.

65. Logic and rigor in the interpretation of the amendment cannot provide an absolute guarantee of maintenance or fostering of First Amendment protections, but it can be assumed to help. Ely writes, p. 112, "One doesn't have to be much of a lawyer to recognize that even the clearest verbal formula can be manipulated. But it's a very bad lawyer who supposes that manipulability and infinite manipulability are the same thing."

66. Ibid., p. 109.